

Response by Cooper Legal¹ to the New Zealand Government response to the United Nations Committee Against Torture's request for further information on Recommendation 11

The Committee Recommendation 11 states:

The State Party should take appropriate measures to ensure that the allegations of cruel, inhuman or degrading treatment in the "historic cases" are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.

It is submitted that this reply to the response should be read in conjunction with the report of the Human Rights Commission ("HRC") on the Response of the Government to Historic Claims. There is a considerable disparity between the HRC findings and the Government's response.

- **The response states that the historic cases encompass a broad range of allegations of ill-treatment while in Children's Homes, psychiatric institutions and other forms of State care in periods ranging in 1950 from 1992. (Government response, page 5)** This is not correct. At least 20% of the claims from Cooper Legal extend well beyond 1992. A number of claims relate to abuse suffered this century.
- **The response states that the Government has engaged with the claims both systematically and in each individual case. First, the response states that at a systemic level, allegations of ill treatment in a given institution are "thoroughly investigated". (Government response, page 5)** The first difficulty with this proposition is that the "investigation" is done internally, which means that it is not impartial. Secondly, contrary to the submissions, investigations are not "thorough". It is clear that the extent of an investigation is to review records and/or put the allegations to the staff named. In the first instance, if the records do not reveal evidence of abuse, the response is that it cannot have taken place. In the second instance, if the staff member(s) and/or carer(s) deny the allegations, the denials are accepted at face value. In sum, this is hardly a thorough, impartial investigation such as that recommended by the Committee.
- **Secondly, the response states that, individually, Court and Police procedures have been supplemented with a Confidential Listening & Assistance Service, which can provide support and other assistance, and with an alternative resolution process, which can provide compensation, apologies and other remedies.**

¹ The firm that deals with the vast majority of New Zealand cases.

(Government response, page 5) In relation to the alternative resolution process, it is observed that there is no ADR process for the psychiatric hospital, military or education claims. The sole focus is the Department of Social Welfare claims. Further, the process is extremely litigious. In reality, the process is internal and without accountability. In relation to the Confidential Listening & Assistance Service, this only deals with claims in relation to events that occurred prior to 1992.

- **The response has gone on to state that many of the present claimants have chosen to conduct civil proceedings. (Government response, page 5)** This is not true. Claimants have been forced into the "litigation" path in order to protect their positions vis à vis the Limitation Act 1950, a technical, optional defence, which is aggressively used by the Crown, wherever possible. In at least one case, the Ministry of Social Development has been approached to settle a client's claim but would not do so without viewing a draft statement of claim². This is despite the facts that records clearly demonstrated that this particular claimant had been ill-treated at the institution in question.
- **The response has gone on to state that in some cases legal proceedings do not provide a comprehensive or appropriate response for a number of reasons. First, the response has identified that court claims must satisfy normal standards of proof. The response has stated that, while a number of historic claims have proceeded to trial, these, to date, have failed to establish the allegations advanced. (Government response, page 6)** This is incorrect. The ADR process also requires a significant evidential burden to be discharged, at least for financial compensation to be part of any resolution. In only one of the cases that has gone to trial did the allegations advanced fail to be satisfied.³ In each of the other historic claims that have been to trial (*W v Attorney-General*; *S v Attorney-General*; *White v Attorney-General*; *J v Crown Health Financing Agency*), the substantive allegations were found to be established. *White* and *J* failed because of the Crown's successful reliance on the limitation defence.
- **Secondly, the response has gone on to state that court claims must also comply with "standard procedural requirements", including, so far as applicable, standard limitation periods. (Government response, page 6)** This is incorrect. There is no requirement that the Crown raise the Limitation Act as a defence. The Limitation Act defence is optional.
- **Thirdly, the response has stated that the Crown seeks to resolve claims based on their facts, without regard to statutory defences**

² The claimant had been intended as a witness for a case that ultimately settled and had already provided a full, signed brief of evidence.

³ *Knight v Crown Health Financing Agency* (High Court Wellington, Gendall J, 16 November 2007)

and puts limitation periods to one side and has settled with 110 claims on this basis. (Government response, page 6) This is also incorrect. The 110 claims that have been settled are in fact largely comprised of the Lake Alice settlement group claimants – who numbered about 90. In that case, the Government instituted an inquiry after several years of litigation. If the Lake Alice claims are removed, the number of claims that have, in fact, been settled out of court is significantly lower than the 110 identified in the response.

- **Fourthly, the response has then stated that the defences such as the Limitation Act are “widely recognised” as acceptable. The case cited by the response, in support of that proposition, is *Stubbings v Webb* (1996) 23 EHRR 213. (Government response, page 6) However, that case has been significantly departed from in relevant respects by the House of Lords in *A v Hoare* [2008] UKHL 6. It is also observed that in *Stingel v Clark* (2006) 80 ALJR 1339, the majority of the High Court of Australia declined to follow *Stubbings v Webb*. In some New Zealand appellate cases, it has been recognised that the limitation defence is not as persuasive in abuse cases, in that there is no public benefit to be obtained in granting repose to perpetrators of abuse: Thomas J in *M v H*.⁴**
- **The response has gone on to refer to the funding situation with the Legal Services Agency. (page 6) Specifically, the response has stated that where, as has occurred in a number of the present historic claims, the claim is determined to have no sufficient prospects of success, funding may not be provided or may be withdrawn. In reality, the Legal Services Agency has, as a “knee-jerk” reaction to the High Court decision in *White v Attorney-General*, instituted the withdrawal of aid process. The Agency’s response and treatment of new claims, is unprincipled and unreasonable. The stance taken by the Legal Services Agency, a State entity, is that none of the claims can succeed - a stance that has not been upheld by the Legal Aid Review Panel or the High Court.**
- **The response has gone on to refer to a research project commissioned by “all affected agencies”, in relation to systemic issues. The report notes that the Ministry of Social Development has recently received results of a year-long research project into a residence that is the focus of a large proportion of claims. The response goes on to state that no systemic issues have been identified. (Government response, page 6) Cooper Legal, too, keeps a database of the allegations made in respect of various institutions.**

There is no doubt that the paper “Institutional Perpetrators of Abuse”, completed by Cooper Legal in 2006 (when the client base was significantly smaller than it is now) reveals systemic abuse. For

⁴ *M v H* (1999) 13 PRNZ 465

instance, in the case of one staff member, 16 individual claimants identified him as physically abusive. Another staff member was identified as physically abusive by 14 claimants. Yet another staff member was identified as physically abusive by 30 claimants. Another named staff member was identified as physically abusive by 29 claimants. A further staff member was identified as physically abusive by 27 claimants. There are also significant numbers of claimants making similar allegations about sexual and physical abuse by various individual staff members.

It is observed that these statistics are four years old, collated when the client base was significantly smaller than it is now – which means the statistics are now likely to be a lot higher.

Further, the difficulty with the year-long research project commissioned by “all affected agencies” is that it was completed internally. Also, the Crown has claimed privilege over this document so lawyers acting for the claimants, and the HRC, have been unable to review it. This is unlike the paper “Institutional Perpetrators of Abuse”, which was sent to Crown Law in January 2006.

It is further observed that, if the assertion by the response that there is no evidence of systemic failure is correct, that would be contrary to the position of every other Commonwealth country and, as stated above, contrary to the research by Cooper Legal.

- **The response also states that the Crown Health Financing Agency has carried out investigations of three psychiatric hospitals: Porirua Hospital, Ngawhatu and Cherry Farm, and that no systemic issues have been identified. (Government response, page 6) Cooper Legal has not seen these “investigations”. Again, they have been internally commissioned.**
- **The response concludes this section by stating that the Government is continuing to review its approach to the resolution of claims, including contributions to legal and counselling or related costs. It is observed that the Legal Services Agency is currently being absorbed into the Ministry of Justice, which must affect its independence.**

Claims involving Child Welfare treatment

- **The response states that, in respect of children formerly in care as State Wards, the Government has adopted an approach of acknowledging and apologising where it has failed people, and helping them to get on with their life. For the reasons referred to elsewhere in this submission, this occurs infrequently.**

- **The response identifies the job of the CCRT as being to investigate all historic claims with priority given to cases where allegations are made in respect of people who are still working for the Government in positions of trust with children and young people. (Government response, page 7)** However, the CCRT is still a part of the Ministry of Social Development. Former social workers and other members of the Ministry of Social Development, ie *employees* of the Ministry of Social Development, are the people who investigate claims. It is submitted that this is patently inadequate. A clear risk of an Institution investigating itself is that the investigation will not be robust. It is for this reason that, as a matter of course, independent assessors are usually called in to investigate this genre of complaint.⁵
- **This is evidenced by the fact that the response states that, to date the CCRT has found no evidence of systemic failure. (Government response, page 7)** Again, if this were the case, this would place New Zealand in a different position from all other Commonwealth countries. This cannot be the case. What this does do, is highlight the inherent difficulties in the State investigating itself.

The response does not discuss the factual findings in the one case that has had a substantive hearing, *White v Attorney-General*. The findings included at least 13 incidents of sexual abuse by a staff member, multiple serious physical assaults by staff members and assaults by boys at the instigation of staff at two institutions. The factual findings clearly support that there was torture, cruel, degrading and disproportionately severe punishment, for which the plaintiffs have been denied a remedy.

- **The response goes on to state that, since 2007, an optional, alternative process to the courts has operated for resolving historic claims by former State Wards. (Government response, page 7)** This appears to be the alternative process through the CCRT (referred to above), which is available to any person, including those who have filed a claim in court. The CCRT process, for reasons referred to in this submission, demonstrates the patent inadequacy of a department investigating itself. It appears from this that those who investigate the CCRT's process are the same people investigating and preparing court claims and defences for filed claims.
- **The response goes on to state that help offered to claimants includes, inter alia, offering financial payments. (Government response, page 8)** This is rarely the case. If compensation is offered, it is usually inadequate but claimants are forced to accept such offers

⁵ In other contexts, such as religious organisations, this is routinely the case – see, for instance, the use of Dr George Barton, an Independent lawyer commissioned by the Presbyterians to do an investigation into allegations of abuse. This was also the case in the Lake Alice process.

due to financial impecuniosity and/or pressure from the Legal Services Agency and/or because the limitation hurdle may be problematic.

- **The response goes on to state that the level of payment offered is consistent with what would likely be awarded by the courts. (Government response, page 8)** This is not the case. Reference is made to one particular case, which was about serious physical and psychological abuse and not barred by ACC. In that case, because the Limitation Act was difficult for the claimant to overcome, the offer from the Crown comprised \$7,000 contribution to counselling and/or other services and \$3,000 towards legal costs (a fraction of the actual amount of the claimant's legal costs). No separate offer of payment was made. In the circumstances, the claimant has been forced to accept the offer.
- **The response then states that, in contrast to court claims, where cases are subject to time limits and other restrictions, compensation payments through this alternative process are not subject to such limits. (Government response, page 9)** This is completely inaccurate. The case referred to above was one such case where the Crown was able to "get away with" an inadequate settlement amount for precisely the reason that the claimant was unlikely to get through the limitation barrier.
- **The response goes on to state that it takes 11 months on average for full consideration of a claim to be completed outside of the courts.** This is "on average" and relates only to claims not filed in court. In relation to claims filed in court, the average time to resolve claims is 34 months. For instance, one particular claimant has waited for nearly two years, so far, for a response to his settlement negotiation meeting.
- **The response goes on to state that the pace of investigation is accelerating as more information is gathered and the Government estimates that all currently known claims will be resolved within 5 years. (Government response, page 9)** This is a different estimation from that contained in the Human Rights Commission report, which forecasts over twice that length of time – which, in our view, is more accurate an estimation. Further claims continue to be lodged with the CCRT. It is also queried how well the "acceleration" fits with the claim that there is no evidence of systemic abuse.

It is observed that, where no lawyers are involved, clients appear to be at a disadvantage in the CCRT process. First, the average settlements negotiated are \$5,400 less (not including legal costs). Secondly, almost all filed claims are settled on the basis of monetary compensation. This is significantly less where a claim has not been filed.

What the response has not stated is that in all but one claim settled that involved allegations of a breach of s 9 of NZBORA⁶, MSD has required the claimant to withdraw the claim in respect of s 9 (but not any of the other causes of action).

Claims involving psychiatric hospital treatment

- **The response states that many former psychiatric hospital patient claimants are currently discontinuing claims as a consequence of a recent Supreme Court decision on the application of a statutory provision. (Government response, page 9)** This is not in fact the case. Approximately 10 claims from Cooper Legal have been discontinued as a result of the Supreme Court decision (about 6% of Cooper Legal's total claimant group). It is observed that, in the circumstances, this is hardly a significant number.
- **The response goes on to state that the claims are about ECT as punishment and other treatment as punishment. The response refers to physical and/or sexual assaults, almost as an aside. (Government response, page 9)** However, for most claimants, the substance of their claim is physical and/or sexual abuse.
- **The response goes on to state that the Crown Health Financing Agency has undertaken a number of steps to investigate the claims. The response then states: "A number of former hospital staff were interviewed, and as a result CHFA is satisfied there is no evidence to show any systemic approach to mistreatment of patients." (Government response, page 9)** However, as with the Department of Social Welfare claims, there has been no impartiality. Claimants have not been interviewed. The Crown Health Financing Agency's conclusion is based on accepting, at face value, denials of former hospital staff – despite a considerable amount of overlap in allegations.

In respect of one named staff member, 6 former patients have identified him as physically abusive. Another former staff member has been identified by 6 former patients. Yet another former staff member has been identified as abusive by 16 former patients. Another staff member has been named by 7 former patients. Another former staff member has been identified by 6 former patients. Yet the response states that CHFA is "satisfied" that there is "no evidence" to show any systemic approach to mistreatment of patients.

Again, this demonstrates the inherent problems when an Agency is permitted to investigate itself. The reason is that CHFA, rather than accepting that at the very least there is an argument, has simply wholeheartedly accepted the testimony of the former staff members

⁶ Section 9 prohibits torture and cruel and unusual punishment.

and unequivocally discounted the testimony of the former patients. This is an inadequate response.

- **In relation to the court process, the response has stated that the Porirua Hospital claim which has been to court, *J v CHFA*, failed because of the accident compensation legislation. (Government response, page 10)** This is not, in fact, the case. The claimant was at Porirua Hospital in 1954 and remained there until 1960. The accident compensation legislation did not apply. The real reason the claim failed was because of the Limitation Act, a defence the Crown vigorously pursued from 1998 when it was first advised of the claim, right through until 2007, when the substantive trial was finally heard. The case had been through numerous interlocutory hearings and appeals before it was finally set down for a hearing.
- **The response states that, since 2005, the claims against the Crown Health Financing Agency have primarily focused on the applicability of statutory restrictions on many of these claims, with representative claims proceeding through the courts until a decision of the Supreme Court in September 2009. (Government response, page 10)** This is correct. In January 2005, counsel for the claimant group were advised that the Crown intended to take the claims through court. In March 2005, the Crown applied to strike out every single claim, with the exception of claims that alleged significant sexual assaults, on the basis that all other allegations fell within the leave and immunity provisions in the mental health legislation. Arguments raised by Crown Counsel include that a nurse stubbing a cigarette out on a patient's arm is "treatment" and thus falls within the immunity provision. All claims have been held up while the Crown's "strike-out" application has been dealt with up through to the Supreme Court.
- **The response states that the effect of the Supreme Court decision is that a large proportion of claims, particularly those relating to events prior to 1972, can no longer be pursued through the courts. (Government response, page 10)** This is not correct. As stated above, notices of discontinuance have been filed in respect of approximately 6% of claims as a result of the decisions of the Supreme Court and Court of Appeal. Any other discontinuances have been because claimants have died and/or for personal reasons decided to discontinue their claims.
- **The response has gone on to state that the Crown Health Financing Agency is willing to meet with claimants to discuss their claims, although most claimants have, to date, chosen not to do so, apparently on legal advice. (Government response, page 10)** This is correct. The reason for this is that one such claimant has met with the Crown Health Financing Agency. The claimant in question, who met with a representative from CHFA and a lawyer from Crown Law, was sent a letter shortly after the meeting, explaining to

him why his claim would not succeed in law, and advising him to discontinue his claim promptly to avoid an order of costs in the event he was unsuccessful. In this case, the claimant made allegations against staff members about whom there is a considerable amount of similar fact evidence. Further, a psychiatric report commissioned for the claimant states that he is clearly able to overcome the Limitation Act defence.

Nevertheless, the claimant was effectively told to "go away", by the Crown Health Financing Agency. For this reason, the lawyers managing the group claims have made the difficult decision that, as long as the Crown Health Financing Agency maintains this aggressive policy, no more meetings and/or settlement negotiations will be taking place.

- **The response has gone on to explain the distinctions between the Lake Alice Hospital settlement process and the current historic psychiatric claims. The "two key differences" identified are that the Lake Alice Hospital claimants' allegations were factually clearly established, and were "substantially the same" in that they related to treatment conditions in the Child and Adolescent Ward at Lake Alice during the period 1972-1977 under the care of one particular doctor. (Government response, page 12)** First, it is observed that the allegations by the Lake Alice Hospital claimants were not "factually clearly established". Cooper Legal acts for a number of claimants who were compensated through the Lake Alice process. What is clear from the claimants' records and statements of evidence is that there was a diversity of allegations and, in many cases, a paucity of records. What is more likely is that with the Lake Alice group, the National Government established an inquiry as a result of political pressure. The "legal" issues were secondary to this. However, now it is necessary for the Government to focus on the perceived "legal" issues because it can point to no other reason for not instituting a similar inquiry.

It is observed that what the distinction noted by the response fails to take into account is the recommendations of the Confidential Forum. While it is true that the current claims allege a range of specific incidences of mistreatment and abuse across a range of institutions, there is nevertheless sufficient similarity within institutions for "systemic abuse and neglect" to be made out.

In conclusion, it is extremely concerning that the Government's response contains many glaring inaccuracies and, in some cases, blatant misrepresentations. A standard "margin of error" allowance *might* permit a small number of inaccuracies, given the density of information involved. However, the Government's response goes significantly further than this in its attempt to respond to the recommendation.

Finally, it is observed that there are over 500 claims already filed in the High Court, with hundreds more to be filed. About 5 claims are set down for substantive hearings each year. To resolve all claims this way would take over 200 years. Clearly, prompt Government intervention is necessary.